EMPLOYMENT TRIBUNALS

Claimant: Mr RA Cowley

Respondent: Witherslack Group Limited

Heard at: Manchester **On:** 19-22 June 2018

Before: Employment Judge Franey
Mr MC Smith
Ms S Khan

REPRESENTATION:

Claimant: In person
Respondent: Mr C Breen, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of detriment in employment on the ground of a protected disclosure fails and is dismissed.

2. The complaint of unfair dismissal fails and is dismissed.

REASONS

Introduction

1. These proceedings began with a claim form presented on 28 June 2017 in which the claimant complained of unfair dismissal from his post as a team leader in a residential care home for children with effect from 31 March 2017. The claim form did not contain any details but they were supplied by his solicitors on 12 July 2017. Those details indicated that the claimant had resigned after a sickness absence meeting in March 2017 in which he was informed that there would be an investigation into a failure to pass on a racist comment made by a colleague. He maintained that this treatment was a consequence of a protected disclosure made regarding his manager, Mr Brown.

2. The response form of 18 August 2017 defended the proceedings. It denied any breach of contract which could give rise to a constructive dismissal. If a dismissal were found to have occurred it was a fair one.

3. The respondent requested further particulars of the claim. They were provided on 17 October 2017. They identified ten matters in total which were said to constitute a breach of trust and confidence causing the claimant to resign. Not all the matters mentioned in the claim form were part of that list. In addition it was clarified that the protected disclosure was made as part of the claimant's grievance of 9 November 2016.

4. At a case management hearing before Employment Judge Horne on 18 October 2017 the complaints and issues were identified. There were three allegations of detriment in employment on the ground of a protected disclosure contrary to section 47B Employment Rights Act 1996 ("the Act"), and the scope of the unfair dismissal complaint was identified. The hearing was listed to deal with liability only.

5. Following the hearing the claimant filed an amended claim form confirming the complaint of detriment in employment.

Issues

6. We discussed the issues with the representatives at the start of our hearing and at the start of the second day a list of issues was agreed. One of the detriment complaints was withdrawn because it had preceded the alleged protected disclosure. The list of issues to be decided by the Tribunal was agreed to be as follows:

Protected Disclosure Part IVA Employment Rights Act 1996

1. Did the claimant make a protected disclosure to the respondent in his grievance of 9 November 2016 in that:

(a) He made a disclosure of information about an occasion on 18 November 2014 on which the claimant was asked by Stephen Brown to lie when compiling an incident report about the restraint of a young person;

(b) the claimant reasonably believed that the information tended to show that a person had failed to comply with a legal obligation and/or that the health or safety of the young person had been endangered, and

(c) the claimant reasonably believed that his disclosure was made in the public interest?

Detriment in Employment – section 47B Employment Rights Act 1996

2. If so, was the claimant subjected to a detriment by any act of the respondent on either of the following occasions:

(a) when he was told at a meeting on 15 March 2017 that he faced further disciplinary action, and

(b) when the respondent repeated that to him in a letter of 20 March 2017?

3. If so, was the ground for any such act that the claimant had made a protected disclosure?

Unfair Dismissal – Part X Employment Rights Act 1996

4. Can the claimant establish that his resignation should be construed as a dismissal in that:

(a) the respondent without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage trust and confidence in any of the following ten respects, taken individually or cumulatively (FBPs pages 1 – 3)

1. The failure of Mr Brown to take action when the claimant reported a drunk colleague in June 2015;

2. Mr Brown's response to the claimant in July 2015 when he questioned Mr Simpson about the rota, and the failure of management to take action when it was reported by the claimant in August 2015;

3. The response to the claimant's report of racist language by Mr Simpson in August 2015;

4. The failure of management to take action in September 2015 when the claimant reported rude and curt email responses by Mr Brown;

5. The failure of management to take action in September 2015 when the claimant reported that Mr Simpson had called a young person a "little dickhead";

6. The failure of management to suspend Mr Brown after the claimant's grievance in November 2016;

7(a). The failure of management to take steps to prevent the claimant coming into contact with Mr Brown on 22 November 2016;

7(b). The failure of management after 22 November 2016 to take action over the use of the term "apply a squeeze" by Mr Brown;

8. The grievance response of 14 December 2016 in which Joanne Sibson concluded that Mr Brown had not treated the claimant unfairly and that the claimant had been warned he would be suspended if there were any more issues raised;

9. The conclusion of Joanne Sibson in the grievance response that action was taken as soon as there was concrete evidence of the colleague being drunk in June 2015;

10. the conduct of the meeting of 15 March 2017;

(b) that breach was a reason for the claimant's resignation, and

(c) the claimant had not lost the right to resign by affirming the contract after the breach, whether by delay or otherwise?

Fairness

5. If the claimant was dismissed, what was the reason or principal reason for the treatment amounting to a fundamental breach of contract? Was it

(a) the protected disclosure (if one is proven), making dismissal unfair under section 103A;

(b) a potentially fair reason relating to capability, or some other substantial reason, in which case the next issue arises, or

(c) a reason falling under neither (a) or (b), in which case dismissal is unfair under section 98?

6. If a potentially fair reason is shown, was dismissal fair or unfair under section 98(4)?

Evidence

7. The parties had agreed a bundle of documents running to over 360 pages. Some documents were added to that bundle by agreement during the hearing. Any reference to page numbers in these reasons is a reference to that bundle.

8. The claimant gave evidence himself. He also provided a written witness statement from his former colleague, Daniel Clough. There was no dispute about the content of Mr Clough's statement and the Tribunal accepted it in written form.

9. The respondent called three witnesses. Joanne Sibson was the Head of People and Talent Development who dealt with the claimant's grievance; Michael Barrow was the Director of Quality Assurance who heard the appeal against the grievance decision, and Marcia Mcloughlin was the Regional Director of Care who dealt with the sickness absence management meeting.

Relevant Legal Principles

Part One: Protected Disclosures

10. A protected disclosure is governed by Part IVA of the Employment Rights Act 1996 ("the Act") of which the relevant sections are as follows:-

"s43A: in this Act a "protected disclosure" means a qualifying disclosure (as defined by Section 43B which is made by a worker in accordance with any of Sections 43C to 43H.

s43B(1): in this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following:

(a) …

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject…

(c) …

(d) that the health or safety of any individual has been, is being or is likely to be endangered…."

11. This is a matter to be determined objectively; see paragraph 80 of the decision of the Court of Appeal in **Beatt v Croydon Health Services NHS Trust [2017] IRLR 748**.

12. The worker need only have a reasonable belief that the information tends to show the matter required by Section 43B(1) and that the disclosure is made in the public interest. A subjective belief may be objectively reasonable even if it is wrong, or formed for the wrong reasons.

13. In **Chesterton Global Ltd and anor v Nurmohamed [2017[IRLR 837** the Court of Appeal approved a suggestion from counsel as to the factors normally relevant to the question of whether there was a reasonable belief that the disclosure was made in the public interest. Underhill LJ addressed the question of the motivation for the disclosure in paragraph 30, saying that:

> "… **while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at paragraph 17 above, the new ss.49(6A) and 103(6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation - the phrase 'in the belief' is not the same as 'motivated by the belief'; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it."**

14. Sections 43C – 43G address the identity of the person to whom the disclosure was made. In this case it was accepted that the alleged disclosures were made to the employer (section 43C).

Part Two: Detriment in Employment

15. If a protected disclosure has been made the right not to be subjected to a detriment appears in Section 47B(1) which reads as follows:

> **"A worker has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure."**

16. The question of what will amount to a detriment was considered in the discrimination context by the House of Lords in **Shamoon v The Royal Ulster Constabulary [2003] ICR 337**: the test is whether a reasonable employee would or might take the view that he had been disadvantaged in circumstances in which he had to work. An unjustified sense of grievance cannot amount to a detriment.

17. The right to go to a Tribunal appears in Section 48 and is subject to Section 48(2), which says this:

> **"On such a complaint it is for the employer to show the ground on which any act or deliberate failure to act was done".**

18. In **International Petroleum Ltd and ors v Osipov and ors UKEAT /0058/17/DA** the EAT (Simler P) summarised the causation test as follows:

> **"..I agree that the proper approach to inference drawing and the burden of proof in a s.47B ERA 1996 case can be summarised as follows:**
>
> > **(a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.**

> **(b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: see London Borough of Harrow v. Knight [[2003] IRLR 140] at paragraph 20.**
>
> **(c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found."**

Part Three: "Constructive" Dismissal

19. An unfair dismissal claim can be pursued only if the employee has been dismissed as defined by Section 95. The relevant part of Section 95 was Section 95(1)(c) which provides that an employee is dismissed by his employer if:

> **"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."**

20. The principles behind such a "constructive dismissal" were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

21. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the House of Lords considered the scope of that implied term and the Court approved a formulation which imposed an obligation that the employer shall not:

> **"…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."**

22. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way at page 611A:

> **"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."**

23. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

24. In **Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908** the Court of Appeal confirmed that the test of the "band of reasonable responses" is not the appropriate test in deciding whether there has been a repudiatory breach of contract of the kind envisaged in **Malik**.

25. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. In **Frenkel Topping Limited v King UKEAT/0106/15/LA** 21 July 2015 the EAT chaired by Langstaff P put the matter this way (in paragraphs 12-14):

> **"12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O'Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:**
>
> > **"… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."**
>
> **13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.**
>
> **14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term."**

26. In some cases the breach of trust and confidence may be established by a succession of events culminating in the "last straw" which triggers the resignation. In such cases the decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial. The Court of Appeal recently reaffirmed these principles in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.**

27. The law relating to the reason for a resignation after a repudiatory breach was reviewed by the EAT (Langstaff P presiding) in **Wright v North Ayrshire Council [2014] IRLR 4.** If an employee has mixed reasons for resigning it is enough if the repudiatory breach played a part in that decision. It need not be the sole, predominant or effective cause.

28. The position as to affirmation once a fundamental breach has occurred was considered by the EAT in **Chindove v William Morrisons Supermarket PLC** UKEAT/0201/13/BA (26 March 2014). In considering whether the passage of time alone could indicate affirmation, the EAT said this in paragraphs 25-27:

> **"25….We wish to emphasise that the matter is not one of time in isolation. The principle is whether the employee has demonstrated that he has made the choice. He will do so by conduct; generally by continuing to work in the job from which he need**

not, if he accepted the employer's repudiation as discharging him from his obligations, have had to do.

26. He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case, the employee is at work, then by continuing to work for a time longer than the time within which he might reasonably be expected to exercise his right, he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time; all depends upon the context. Part of that context is the employee's position. As Jacob LJ observed in the case of Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, deciding to resign is for many, if not most, employees a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test.

27. An important part of the context is whether the employee was actually at work, so that it could be concluded that he was honouring his contract and continuing to do so in a way which was inconsistent with his deciding to go. Where an employee is sick and not working, that observation has nothing like the same force…."

Part Four: Fairness of Dismissal

29. If there has been a dismissal, the first step is to identify the reason or principal reason. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323**, Cairns LJ said, at p. 330 B-C:

"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

30. In a constructive dismissal case that means the reason for the conduct which amounts to a fundamental breach of contract.

31. Section 103A of the Act deals with protected disclosures and reads as follows:-

"an employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure".

32. If the reason or principal reason is not a protected disclosure, the burden lies on the respondent to show that it was a potentially fair reason under section 98. If a potentially fair reason is shown, the general test of fairness appears in section 98(4).

Relevant Findings of Fact

33. This section of our reasons sets out the broad chronology of events to put our decision into context. Any disputes of primary fact central to our conclusions will be addressed in the discussion and conclusions section.

Background

34. The respondent operates a number of residential care homes for children. It is a substantial employer of about 1400 employees with a regional structure and a dedicated Human Resources ("HR") function.

35. Each home has a Registered Manager and is subject to inspection by Ofsted and by the Local Authority Designated Officer ("LADO"). Compliance with the statutory framework for safeguarding children is of the utmost importance.

36. Following completion of his degree in Children and Family Studies, the claimant was employed by the respondent in January 2012. He worked at Cumbria View in Silverdale, a seven bedroom home for children and young people with behavioural, social and emotional difficulties. As a residential support worker the claimant's duties included day-to-day looking after the children. He worked approximately 40 hours each week including some weekend work. He performed well, being promoted to a shift leader in charge of three or four staff members and then to a team leader in 2014.

37. In October 2014 the Home had a new manager, Stephen Brown. He had a reputation for being a strict manager. He told the claimant he expected the claimant to be his "eyes and ears" in the Home. The claimant was uneasy about this as he thought he was being asked to gossip about other members of staff or act as a spy.

38. There was a quick turnover of staff after Mr Brown first arrived and this continued into 2015. The claimant had a concern that he was viewed by Mr Brown as no longer part of his inner circle of trusted colleagues.

November 2014 Text Message

39. On 18 November 2014 the claimant had to deal with an incident about which Mr Brown texted him that evening. The text messages appeared at page 90. Mr Brown sent a text which ended with a winking emoticon. The text read as follows:

> **"I hear a squeeze was utilized? Hope you kept him off the floor? If not write it up as you did! Cheers Russ and thank everyone involved."**

40. Two points are important about this text. The first is that the claimant believed that by using the phrase "a squeeze" Mr Brown was referring to the application of physical pressure to the young person, a restraint technique which was not authorised and which was outside training. The second was that that the claimant thought Mr Brown was telling him to falsify the incident report if the young person had gone down to the floor by writing it as if he had not done so. Nevertheless, the claimant did not report these concerns to anyone else.

May 2015 Text Message

41. On 21 May 2015 there was an incident where the claimant had a confrontation with a young person. He texted Mr Brown to inform him of what had happened. Mr Brown responded as follows (page 91):

> **"Make sure it is logged and phone [the social worker] lay it on thick mate."**

42. The claimant interpreted this phrase as meaning that when recording the matter or reporting to the social worker he should exaggerate how challenging the behaviour of the young person had been. Once again he did not draw this concern to the attention of any other manager.

June/July 2015 – EP alcohol Incidents

43. In June 2015 there was an incident where a colleague ("EP") attended work under the influence of alcohol. He was not suspended and no action was taken against him. The following month he attended work under the influence of alcohol again. This time he was suspended by Mr Brown (pages 339-340) and his resignation was accepted by the Regional Manager, Peter Munro, a few days later (page 341). The failure to take any action on the first occasion by Mr Brown formed **allegation 1** and we will return to it in our conclusions.

Rota Dispute Summer 2015

44. In July 2015 the claimant had cause to query with a colleague, Bryan Simpson, why he was on the rota to work three weekends in a row. The fact he had challenged Mr Simpson came to Mr Brown's attention, and there was a discussion between the claimant, Mr Brown and the Deputy Manager, Graham Burt. The claimant later maintained that in that meeting Mr Brown said to him:

> **"You either get on board or I'll move you out."**

This formed the basis of **allegation 2** and we will return to it in our conclusions.

45. The claimant formed the view that this was a threat by Mr Brown. In early September he spoke to Ms Mcloughlin on the telephone. There was discussion of the weekend rota issue. The claimant forwarded the emails about this issue to her (page 179) as part of a chain of emails in which he considered he had received curt and abrupt responses from Mr Brown. His allegation that nothing was done about these emails formed **allegation 4** and we will return to it in our conclusions.

Alleged Racist Comment

46. On 5 August 2015 the claimant was undertaking a supervision meeting with a colleague who had only been at the home a few weeks, Rebecca Naylor. She told him that two or three weeks earlier Mr Simpson had made a comment to her about a young person in which he called the young person a:

> **"Little fucking Paki."**

47. The claimant made a formal note of that supervision which he and Ms Naylor signed. Mr Brown was on holiday at that time so the claimant rang a more senior manager, Mr Ellis. Mr Ellis told the claimant to send an email to the team reminding them about appropriate language and that he would speak to Mr Brown when Mr Brown returned to work. The claimant sent an email to all staff about language (page 173).

48. Mr Brown was informed and spoke to Rebecca Naylor on his return from holiday. She later told Ms Sibson in the grievance investigation (page 288) that Mr Brown told her that Mr Simpson would lose his job if she took it further, and that he asked her to go away and think about it. Subsequently a supervision note of a

discussion on 12 August 2015 was prepared by Mr Brown (page 172A) which recorded that it was Ms Naylor who was reluctant to pursue the matter further and who declined to tell him what words had been used by Mr Simpson. Ms Naylor told Ms Sibson in November 2016 that she had not seen that record and had not signed it. The way in which this matter was handled formed the basis of **allegation 3** and we will return to it in our conclusions.

Supervision 27 August 2015

49. On 27 August 2015 the claimant had a supervision meeting with Mr Brown and Mr Burt. The notes appeared at pages 166-167. They recorded a concern being raised with the claimant about his continued negative conduct within the home, particularly in relation to his attitude towards Mr Simpson. There was discussion about the rota completed by Mr Simpson. Mr Brown told the claimant that his "public humiliation of other staff along with his lengthy demotivating and ranty emails" were counterproductive and showed him in a negative light. The claimant did not accept that assessment as genuine. Mr Burt said that two staff had complained that the claimant treated them unfairly, picking on them for minor things but letting other staff off with more major things. The claimant raised the issue of the racist remark by Mr Simpson. It was plainly a difficult meeting.

"Dickhead" Comment

50. **Allegation 5** was that in September 2015 the claimant reported to Mr Burt that Mr Simpson had referred to a young person as "a dickhead" but that Mr Burt failed to take appropriate action. We will return to this issue in our conclusions.

Mediation Meetings

51. The working relationship difficulties led to attempts at mediation and the claimant met the Regional Manager, Mr Taylor, and Mr Brown on 30 September.

52. There was a further mediation meeting between the claimant, Mr Simpson and Mr Burt on 23 October 2015.

Valente Incident October 2015

53. In October 2015 there were difficulties between the claimant and a female colleague, Ms Valente. The claimant had informed Mr Brown that he had some reservations about whether she was suited to become a shift leader. Mr Brown told Ms Valente of what the claimant had said and she took exception to this. There was a discussion between them and a couple of days later Ms Valente accused the claimant of having assaulted a young person. By a letter of 6 November 2015 Mr Brown suspended the claimant (page 342). On 19 November (page 343) the claimant was advised by Mr Munro that there was no evidence to confirm the allegation and therefore no further action would be taken.

Suspension November 2015

54. On 19 November 2015 the claimant was suspended again following allegations made against him by two members of staff. He was not told what the allegations were. In fact there were two written complaints alleging that he had been bullying the members of staff concerned and had left them in tears. The grievances

were considered by the Operations Director, Howard Tennant, and he decided that the claimant would be suspended, since otherwise the claimant and the complainants would have been working together in the same home.

55. Suspension was confirmed by a letter of 24 November 2015 (pages 75-76) but again no details were given. This was an extremely worrying time for the claimant.

Investigation Meeting 7 January 2016

56. The investigation was conducted by Ms Mcloughlin. She met the claimant on 7 January 2016. The notes appeared at pages 344-354. The claimant was informed of the complaints against him, although not shown the written complaints. To him they appeared very minor. Candice Valente alleged that he had shouted at her and not spoken to her professionally; Anne-Marie Allen alleged that she did not like the way he had asked her to make tea for the young people and that the claimant had turned the light off and shouted at her whilst she was in the toilet.

57. The claimant responded to the allegations. In the course of the meeting he made clear that he did not fully blame Ms Valente. He said she had been "handed a loaded gun" by Mr Brown and fired it. He believed that the two women had been encouraged to make formal allegations against him by Mr Brown. The notes at the top of page 349 recorded the claimant saying that Mr Brown's presence at the home had been a good thing in some ways, but he emphasised that he felt that he was part of a victimisation campaign by Mr Brown because he would not "be his tell-tale". He later said (page 353) that Mr Brown wanted him out and there were only two people left from when Mr Brown joined the home. He said he felt targeted and that his days were numbered. He did not trust Mr Brown.

Investigation Outcome 19 January 2016

58. The outcome to the investigation was conveyed by Ms Mcloughlin at a further meeting on 19 January 2016. The notes appeared at pages 355-356. Ms Mcloughlin was of the opinion that there was limited evidence to suggest the need for formal disciplinary action. Instead the issue was a breakdown in working relationships. She offered the claimant the chance to transfer to a different home, which he accepted a few days later. He moved to Highfield House with effect from 25 January 2016 (page 356).

59. The outcome was confirmed in a letter from Ms Mcloughlin of 28 January 2016 at page 357. The claimant was given the right of appeal but of course he was happy with the decision that no disciplinary action would be taken.

Highfield House February 2016

60. Unfortunately the claimant did not last long at Highfield House. He was involved in an unpleasant incident with some young people on a trip out on 12 February 2016. The following Monday he was unable to work and was certified unfit for work due to stress.

Sick Leave from February 2016

61. The claimant remained on sick leave until the termination of his employment over 12 months later.

62. In that period he went onto half pay in July 2016 and no pay in December 2016. An Occupational Health report of 8 August 2016 (pages 79-81) recommended a stress risk assessment on his return.

63. In May 2016 Mr Brown was promoted to Regional Manager. He was no longer the Registered Manager for any individual care home.

64. Unfortunately the claimant suffered a heart attack on 4 September 2016 and was hospitalised again with chest pains in early November 2016.

Grievance 9 November 2016

65. On 9 November 2016 the claimant submitted a grievance to Ms Mcloughlin. His email appeared at page 82 and he sent a supplementary email with some text messages attached (page 83).

66. The grievance document itself appeared at pages 84-88. It was a grievance against Stephen Brown. It began by saying that Mr Brown had treated the claimant unfairly and unprofessionally by telling him to lie in official documentation. The text message from November 2014 was provided. It was the claimant's case that this element of the grievance formed his protected disclosure and we will return to that in our conclusions.

67. The grievance went on to make the following points:

(a) In May 2015 Mr Brown had texted the claimant to tell him to “lay it on thick”, meaning to exaggerate the behaviour of the young person.

(b) Mr Brown had taken the claimant to task for questioning the rota with Mr Simpson and had made the comment about him getting on board or being moved. This had been reported to Ms Mcloughlin in the telephone call on 1 August 2015, and subsequently the claimant sent her the email exchanges which were curt and rude. Mr Taylor had failed to deal with this properly when he meet the claimant on 30 September 2015.

(c) The racist comment by Mr Simpson had been reported to Mr Brown in August 2015 but no appropriate action had been taken. The claimant had been disgusted by the lack of action by Mr Brown, as had Ms Naylor.

(d) Mr Brown had adopted “a systematic and pre-planned underhand campaign” against the claimant to force him out of Cumbria View. The claimant had suffered with severe stress, depression and anxiety because of his treatment by Mr Brown.

68. **Allegation 6** was that Mr Brown was not suspended upon receipt of this grievance. We will return to that in our conclusions.

Grievance Meeting 22 November 2016

69. Ms Sibson was appointed to investigate the grievance. She arranged to meet the claimant at Head Office on 22 November.

70. As the claimant parked there before the meeting he came across Mr Brown in the car park. Mr Brown waved to acknowledge him. The claimant was upset by this encounter. **Allegation 7(a)** was that steps should have been taken by management to ensure that Mr Brown was not at Head Office that day. We will return to that in our conclusions.

71. The notes of the grievance meeting appeared at pages 93-106. It was a wide-ranging discussion. The claimant began by expressing his shock at seeing Mr Brown in the car park. Ms Sibson said that she had only discussed today's meeting with the claimant and did not know where the Regional Managers were going to be. They went on to discuss the following matters:

(a) The text message of 18 November 2014;

(b) The way in which EP's attendance at work whilst drunk had been handled;

(c) The "lay it on thick" text from May 2015;

(d) The dispute about the rotas and the comment about how the claimant should "get on board";

(e) The allegations for which the claimant had been suspended in November 2015;

(f) The dispute with Candice Valente in October 2015;

(g) The incident in the trip from Highfield House in February 2016 which had triggered the claimant going off sick.

72. At the end of the meeting the claimant added that he felt uneasy about what he had heard about how Mr Brown used to conduct himself at Witherslack school. He suggested that Mr Brown would be in prison if he did what he did there. Ms Sibson cautioned the claimant about hearsay.

73. The outcome the claimant wanted from the grievance was for Mr Brown to be sacked. He emphasised how ill he had been because of the treatment.

74. After the meeting Ms Sibson telephoned the claimant to ask him about the historical allegations about Witherslack Hall. She asked the claimant if he had anything else to add and he said not. A note of that discussion appeared at page 105.

Grievance Investigation November – December 2016

75. Ms Sibson proceeded to investigate the grievance. She conducted 11 interviews of various members of staff. The notes appeared between pages 243 and 299. The notes were signed by the individuals in question and a number of them were accompanied by the signed handwritten notes as well. We will refer to what

was said during those grievance interviews in our discussion and conclusions section when considering the relevant allegations. It should be noted, however, that the allegation that Ms Sibson took no action over Mr Brown's use of the phrase "a squeeze" formed **allegation 7(b)** and we will return to that matter.

76. Whilst the grievance investigation was ongoing the claimant was seen by Occupational Health on 7 December. A report at pages 107-109 endorsed the conclusion that the absence was due to work related stress, and said:

> **"I consider that Russell is not fit to return to the substantive work role for the foreseeable future. Based on today's discussion I suspect that Russell will not be returning to this post due to the reported work issues."**

77. Ms Sibson also considered a number of documents in her investigation. She listed them in her grievance investigation report at pages 146-151. They included supervision records of the claimant and Rebecca Naylor. That included not just the supervision record of 12 August at page 172A (an unsigned record which Mr Brown supplied) but also the note of the supervision between Ms Naylor and the claimant on 5 August 2015 (pages 172B and 172C). That document made no mention of the racist comments by Mr Simpson.

Grievance Outcome 14 December 2016

78. Ms Sibson's conclusions were set out in an outcome letter of 14 December 2016 at pages 110-112. She rejected the central contention that Mr Brown had treated the claimant in an unfair and unprofessional manner at Cumbria View. She said there had been issues about the claimant's own behaviour and that he had been given fair warning that if there were any more concerns raised, suspension would be likely. This formed part of **allegation 8** and we will return to it in our conclusions.

79. Ms Sibson did not agree that Mr Brown had been curt and rude in his emails about the weekend working in London, and she concluded that management had dealt with the alcohol issue with EP as soon as concrete evidence was available. This formed the basis of **allegation 9** and we will return to it in our conclusions.

80. The grievance letter included the following:

> **"There were two points which, whilst I did not believe constituted unfair and unprofessional treatment to you personally, did require further action. These have now been escalated accordingly.**
>
> **What I must say is that it concerned me greatly that if you had genuine concerns regarding the welfare of our young people as you implied throughout your grievance that you did not follow safeguarding procedures and escalate matters at the time. This matter would need to be addressed on your return to work.**
>
> **I do not understand the delay in raising this grievance especially since you have now been off sick since February 2016 and out of the workplace all of this time. This has not helped with my investigation or ensuring that potential safeguarding matters are addressed when they should have been. Equally, you had been offered and agreed to move to Highfield House which involved working with a new team and new management.**
>
> **We have a well-documented grievance and whistle-blowing policy and it is clear to me that you had communication with members of the team, namely Marcia Mcloughlin**

> **(Regional Director) and even Howard Tennant (Operations Director) in November 2015 and had access to raise an issue should you have wanted to.**
>
> **There had been plenty of opportunity to raise these points previously and some fell within safeguarding responsibilities…"**

81. This passage in the grievance outcome letter formed an important part of this case. Two matters should be emphasised:

(1) The claimant did not know which two points were going to be escalated and how that escalation would occur. In fact Mr Brown was investigated in relation to the text messages from November 2014 and May 2015, and in relation to the allegation of historic actions at Witherslack Hall. Ms Mcloughlin investigated those matters and reported to Mr Tennant. Her report said there was no evidence of any misconduct at Witherslack Hall, but recommended disciplinary action in relation to the text messages. That disciplinary action was pursued and Mr Brown received a final written warning in early 2017 which was live for two years. None of this was explained to the claimant.

(2) The letter did not make clear which safeguarding concerns would need to be addressed with the claimant when he returned to work.

Grievance Appeal

82. The letter gave the claimant the right of appeal. He appealed by email of 20 December at pages 113-114. He said he was devastated by the rejection of his grievances. He took issue with a number of points in the letter. He said he did not know of any formal communication that indicated that performance concerns could result in suspension. He pointed out apparent inconsistencies between conclusions that Mr Brown had not acted properly and the fact his grievance was rejected. He said:

> **"I am appalled that you can threaten me with an implied intention to pursue matters you claim that I failed to escalate. I have at all times acted appropriately and within my scope and have never taken advice to act improperly as was suggested in the communications from Mr Brown."**

83. The appeal was acknowledged on 22 December by Mike Barrow. He noted that the claimant said in his email that he did not want to attend a meeting because of his health. Mr Barrow spoke to Ms Sibson twice about her conclusions. No notes of those meetings were made.

84. His appeal outcome was set out in a letter of 9 January 2017 at pages 117-120. He confirmed it was a review of the process not a complete re-hearing. He confirmed that action had been taken with Mr Brown but he could not disclose what it was due to concerns about confidentiality and data protection. He did confirm, however, that Mr Brown would not be sacked.

85. As to the complaint about the impact of the Mr Brown's actions on the claimant, he concluded that Ms Sibson had undertaken an appropriate investigation and it was reasonable for her to reach her conclusions. He also said:

> **"I am also satisfied that it was appropriate for Joanne Sibson to query why concerns were not raised by you earlier, or to refer to the fact that issues had also been raised**

> **about your own performance. That is not being disrespectful but simply putting into context all relevant information to give a complete picture of the situation."**

86. Mr Barrow ended his letter by urging the claimant to discuss with the company measures to be put in place to lead to a return to work. He said that sufficient reassurance could be given that he and Mr Brown need not work together in future.

Meeting 20 January 2017

87. Although the claimant had indicated he did not want to attend a grievance appeal meeting, he did have a meeting with Mr Barrow at his own solicitor's office on 20 January 2017. Brief handwritten notes kept by Mr Barrow appeared at pages 121A-121B. They recorded that Mr Simpson had called a young person a "dickhead", and that this had been reported to Mr Burt. There was no record of the claimant having raised that previously. The claimant queried whether he had signed the supervision note which recorded that he could have been suspended. That was a supervision note which appeared in our bundle at page 169. The claimant made clear his view that Mr Brown was being protected by the company.

88. It was the claimant's case that in the course of that discussion he asked Mr Barrow what he would be investigated about upon his return to work, and that Mr Barrow referred to the racist remark by Mr Simpson in his reply. Mr Barrow's evidence was that the racist comment was to be addressed with Mr Simpson, not with the claimant. Mr Barrow had asked Ms Mcloughlin to look at that matter, and she spoke to Mr Tennant who said it had all been dealt with back in 2015. Ms Mcloughlin passed that information on to Mr Barrow and it was not taken any further. We will return to this issue in our conclusions.

Absence Management Measures January – March 2017

89. After Mr Barrow issued his appeal outcome on 9 January, Ms Mcloughlin wrote to the claimant on 17 January asking to meet him to discuss a return to work. The letter appeared at page 127.

90. They had a meeting on 14 February recorded at pages 124-127. There was discussion of the Occupational Health reports, the medical position and a potential return to work. The claimant said he was not well enough to return at that stage.

91. That discussion was summarised in a letter from Ms Mcloughlin of 23 February 2017 at pages 128-129. She made the point that the job could not be held open indefinitely. She was concerned that the claimant might not be able to return to work. She invited him to a formal absence review meeting on 3 March. That meeting was then delayed to 15 March (page 130).

92. At some point in early March the claimant made a posting on Facebook (page 131) in which he referred to his employers as a "set of bastards". He made other critical comments.

Meeting 15 March 2017

93. At the meeting on 15 March 2017 the claimant was accompanied for the first time by his union representative, Mr Young. The notes of this meeting appeared at pages 132-136. There was discussion of the return to work issues. The claimant

made clear his concern that he would be targeted again. He referred to the letter from Mr Barrow about action over safeguarding procedures. He said:

> **"I addressed that with him, and he referred to the racism incident."**

94. The claimant made clear that he had done what he should over the racism by reporting it to Mr Ellis.

95. Towards the end of the meeting Ms Mcloughlin said that the Facebook posting would need to be addressed. It did not appear from the notes that there was any other discussion about the safeguarding issues which were to be addressed as well.

Letter 20 March 2017

96. However, that matter was raised in the letter which Ms Mcloughlin sent to the claimant on 20 March at pages 137-139. At the end of the letter she referred to the Facebook postings but in addition this paragraph appeared:

> **"I asked you how you felt about a possible return to work after being off for over a year. You said that you felt you 'had been targeted before and will be again'. You mentioned your grievance appeal and how Mike Barrow has 'threatened' you with action against you for allegedly not following safeguarding procedures. I have checked with Mike by way of clarification and I understand the situation to be that we would need to carry out an investigation into this following your return to work. I realise that the word 'investigation' may be worrying for you, but it is not meant as a threat. There is no assumption of guilt and the purpose of an investigation is to gather facts so that the company can look into and address any shortfalls in procedure. You would be interviewed as part of this process."**

Resignation 31 March 2017

97. Eleven days later the claimant resigned by a letter of 31 March 2017 (pages 141-142). His letter began as follows:

> **"Following the meeting I had with you on Wednesday 15 March and your letter of 20 March I have decided to resign from my position as team leader with Witherslack Group. I feel that my continued employment with the company is no longer tenable. Although in your letter of 20 March you suggest a return to work with amended duties and a phased return, I do not consider that the company is capable of providing the support I would require and in the final paragraphs of your letter you suggest that further investigations are to be carried out against me for, allegedly, not following safeguarding procedures. This is typical of the way in which the company have behaved towards me since I raised concerned about Mr Stephen Brown and there is no conclusion other than the fact that I am now being victimised. In these circumstances I have no alternative but to pursue a claim for constructive dismissal against the company."**

98. The letter went on to make six numbered observations which can be summarised as follows:

(1) The claimant had been incorrectly suspended in 2015 and this culminated in his heart attack in September 2016.

(2) He had been threatened with disciplinary action for not passing on the racist comment, which was incorrect.

(3) He was being targeted as a result of the fact that he used the whistle-blowing policy.

(4) He had received no adequate assurance that on his return to work account would be taken of the stress and anxiety he had suffered.

(5) Mr Brown was still employed in a senior management position despite the text message: he had not been suspended and had since been promoted.

(6) There had been a breach of confidentiality when Mr Brown told Ms Valente in 2015 that the claimant had expressed reservations about her work.

99. The letter ended as follows:

> **"Having already had one heart attack following the stress and anxiety of an incorrect suspension, I am not willing to risk my health again and do not feel that I am being given any proper assurance that it will not happen again. To the contrary there is a suggestion that it will happen again with the unjustified allegation that I did not follow safeguarding procedures. On the basis of the above and putting my health and welfare as my main priority I feel that I have no other option but to resign from my position with the Witherslack Group."**

100. The claimant was offered the opportunity to retract his resignation but declined and his resignation was accepted with effect from the end of April 2017 (page 145).

Submissions

101. At the conclusion of the evidence each party made an oral submission.

Respondent's Submissions

102. On behalf of the respondent Mr Breen made two introductory points. He said that the claimant's case was that there was a conspiracy by a number of different people at the organisation going as far up as Mr Tennant to cover up and make sure his grievance could not succeed in an attempt to protect Mr Brown. He suggested that was a nonsense not supported by the evidence, particularly since Mr Brown received a final written warning valid for two years. He suggested the claimant's credibility was impaired by this allegation and that the truth was that he had waged a campaign against Mr Brown for personal reasons. His second introductory point was that there was a gap of 12 months in the timeline between allegation 5 in September 2015 and allegation 6 from November 2016. The resignation letter focussed on events from 2016. The case that there was a fundamental breach of contract in 2015 which caused the claimant to resign could not be supported.

103. Mr Breen then addressed the List of Issues. The disclosure was not made in the public interest because it was part of the personal campaign against Mr Brown. The delay in raising the text messages between November 2014 and November 2016 was evidence of that. As to the detriments, the respondent was entitled to take action over the failure to report the text messages at the time and if the claimant believed it was about the racist comment, he was mistaken.

104. In any event the decision to investigate those matters was not motivated by any protected disclosure and the investigation would have been required however those text messages came to light.

105. Turning to the allegations of a fundamental breach of contract, Mr Breen addressed each in turn. He relied on the age of the allegations in relation to allegations 1-5. Any failure of Mr Brown to take action over the drunk colleague could not affect the trust and confidence of the claimant. Allegation 2 was stale and there was no record of the claimant raising this point with Ms Mcloughlin. In relation to the racist comment, some action was taken by managers and the claimant's case that documents had been fabricated did not withstand scrutiny. He would need cogent evidence for the Tribunal to conclude that such fraudulent conduct had taken place.

106. The emails showing rude and curt language by Mr Brown were addressed by Ms Mcloughlin: she forwarded them to Mr Taylor and he arranged the mediation meeting. The “dickhead” comment was not raised by the claimant in his grievance or his resignation letter and appears to have been raised only verbally with Mr Barrow in January 2017. It could not constitute a breach of trust and confidence.

107. Turning to the 2016 matters, the decision not to suspend Mr Brown was a reasonable one. The claimant's suspension in November 2015 was appropriate because at that time he would have been working with the two people who had made serious allegations against him. The position was different for Mr Brown in November 2016. Suspension was properly considered and rejected. There was no fundamental breach.

108. The encounter in the car park was entirely unintentional and coincidental: no-one knew that Mr Brown was arriving at Head Office that day. Allegation 7(b) was unfounded because action had been taken over the use of the term “apply a squeeze” even though the claimant did not know that. The conclusion in the grievance report was a reasonable one viewed overall because Ms Sibson was rejecting the claimant's contention there had been a course of unfair treatment overall, even though her concerns about the text messages were the subject of further action against Mr Brown. The conclusion that the claimant had been warned he might be suspended was a reasonable one given the document in the bundle (page 169) which recorded that. Ms Sibson could not have known that the document was not genuine even if that were the case (which was not accepted).

109. As for allegation 9, there was conflicting evidence about what had happened in 2015 and the statement mentioned by Mr Jackson about EP’s drinking (see below) had not been obtained upon enquiry. The conclusion that action was taken when concrete evidence was obtained was a reasonable one given the conflicting information provided.

110. Finally, the discussion at the meeting on 15 March simply reflected that Ms Sibson had indicated that further matters would be pursued with the claimant and this added nothing. Mr Breen therefore invited us to reject both the detriment complaint and the constructive unfair dismissal complaint.

Claimant's Submission

111. The claimant began by emphasising that this case was about the way Mr Brown had treated him and the fact the respondent did not deal properly with that when he raised it in his grievance. He emphasised that it was conceded by the respondent that the text messages in November 2014 were inappropriate.

112. On the question of the protected disclosure the claimant submitted that he had a belief that Mr Brown should not be working with young people, and this was why he submitted his grievance which asked for Mr Brown to be dismissed. That showed he did have a belief that his disclosure was in the public interest.

113. In relation to the detriments, the claimant pointed out that he had to guess what he was going to be investigated about. He believed it was racism, and made that clear to Ms Mcloughlin. In a subsequent letter she did not put him right on that. Even if the respondent was actually going to carry out an investigation into his failure to report the text messages, which he doubted, he was still left under a misunderstanding. As to causation, this happened because he lodged his grievance including the protected disclosure about the text messages.

114. The claimant then turned to the ten allegations forming part of the constructive unfair dismissal complaint. In relation to allegation 1 he emphasised that Mr Jackson did a statement and it was suspicious that that document could not be found when lots of documents critical of him appeared to have been easily recovered. The fact no action was taken by Mr Brown over EP being drunk was a massive concern.

115. In relation to allegation 2, the failure to take action over the "get on board" comment was evident from the fact that Mr Taylor did not mention this when he met the claimant and Mr Brown on 30 September 2015. As for the racist language, it was clear that senior managers had failed to document what they did on such a serious issue: the only documentation was completed by himself and Ms Naylor. We were invited to accept what Ms Naylor told Ms Sibson about how Mr Brown tried to deal with it and to find that this was a breach of trust and confidence.

116. In relation to allegation 4, the claimant accepted that Ms Mcloughlin had passed the email to Mr Taylor but once again he had failed to address this with Mr Brown in their meeting at the end of September. There was only a discussion of the breakdown in working relationships.

117. In relation to allegation 5, the claimant stood by his account at pages 49 and 50 that Mr Burt said he was not going to record the word "dickhead" in his record of speaking to Mr Simpson.

118. As to the gap between allegations 5 and 6, the claimant emphasised that he felt targeted by Mr Brown from early 2015, that he had never had a negative supervision notice or any conduct issues before then, and that he was aware that he was in a fight with Mr Brown from then on. He emphasised the impact on him of the way he was treated, including the suspension in late 2015, and this meant that when he moved to Highfield House he was unable to cope with the incidents that caused his breakdown. Previously he could have coped with that without difficulty. He had been very ill indeed during 2016, but his heart attack had been almost like a "system reset" and had enabled him to focus on what had happened and to lodge his grievance. He submitted that the delay should not count against him.

119. Turning to allegation 6, the claimant emphasised that he had been suspended for trivial matters in 2015, and if Mr Brown had really received a final written warning for the text messages then it showed he should have been suspended when the claimant raised it. He did not accept that Mr Brown was not in direct contact with him as a reason for not suspending him.

120. The car park incident was foreseeable and should have been prevented by management: Mr Brown should have been told to stay away from Head Office on the day the claimant was due there. Although management now said that some action had been taken over the "squeeze" comment, that had not been made plain to the claimant and no evidence had been produced in this hearing.

121. Turning to allegation 8, it was not credible that Ms Sibson could reject his grievance and yet find that the text messages warranted disciplinary action. Ms Sibson should have appreciated that page 169 recording a warning about suspension was not genuine because the opening words of that page had obviously been cut and pasted from another supervision note, and the fact it was unsigned should have made her realise that it could not be genuine. Unsigned documentation was regularly identified by monthly audits and rectified. Further, Ms Sibson's conclusion that the alcohol issue had been addressed when concrete evidence arose could not be right given what Mr Jackson said about the statement he had done. Ms Sibson had not interviewed Ms Valente and the claimant's own account had been ignored.

122. In relation to allegation 10, the claimant relied on what he had said earlier about how he was left thinking it was the racist incident when in fact the respondent was now saying it was not. He therefore submitted that these matters taken together amounted to a breach of trust and confidence which meant that his resignation was a dismissal.

123. As to the reason for dismissal, the claimant submitted that it was all a consequence of his protected disclosure in the grievance. The disclosure in relation to the text messages and the fact he produced the text messages themselves meant that it could not be brushed under the carpet. The whistle-blowing complaint should therefore succeed in relation to unfair dismissal.

Discussion and Conclusions – Protected Disclosure

124. The first issue was whether the claimant had made a protected disclosure in his grievance. The only dispute in this case was issue 1(c) about whether he had a reasonable belief that his disclosure was made in the public interest. The information he disclosed was clearly capable of forming the basis of a public interest disclosure given that he could reasonably think it related to the falsification of records about young people in case.

125. The argument of the respondent was that the claimant's purpose in making the disclosure within his grievance was purely personal: to pursue his concerns and to try and get Mr Brown sacked. Mr Breen suggested that was evident from the fact that the text message had not been raised in 2014. In contrast the claimant made clear he did have a concern that Mr Brown was not suitable to be working in a Children's Home.

126. We accepted that the impact on him personally of Mr Brown's actions was a significant part of the claimant's reason for raising his grievance in November 2016. However, there is no requirement that his belief that it is the public interest be a predominant motive for making the disclosure as long as he does actually hold that belief at the time the disclosure is made: see paragraph 30 of the decision in **Chesterton**.

127. On balance the Tribunal rejected the respondent's argument and found in favour of the claimant on this point. We were satisfied that the claimant was genuinely and firmly committed to the wellbeing of the children in care. His care for the young people and his focus on safeguarding issues shone through the evidence we heard. We were satisfied that he held a belief that it was in the public interest to bring to light his concerns about how Mr Brown had been behaving, even though he was motivated at least in part by his personal interests as well. We concluded that the element of the grievance about the November 2014 text message was a protected disclosure under the Employment Rights Act 1996.

Discussion and Conclusions – Detriment Claim

128. Issues 2 and 3 together raised the question whether, because of that disclosure, the claimant was subjected to any detriment falling short of dismissal. The two detriments were really two manifestations of the same thing: the indication that there would be further investigation of the claimant once he returned to work.

129. We had to make a factual finding about what was to be investigated after the grievance outcome. The respondent's case was that the matter to be investigated was his failure to report the texts from Mr Brown in November 2014 and May 2015. The claimant's case was that he was going to be investigated for an alleged failure to report the racist comment made by Mr Simpson.

130. It was clear that the claimant was not at first sure what would be investigated. It was not made clear in the grievance outcome or the appeal outcome. The claimant subsequently met Mr Barrow on 20 January 2017 and following that meeting he was under the firm impression that he was going to be investigated because of the alleged failure to report the racist comment. He made that clear on 15 March with Ms Mcloughlin as recorded at page 133. Ms Mcloughlin's letter of 20 March 2017 at page 139 did not correct that misapprehension. Although her letter said she had spoken to Mr Barrow, she did not make clear that the claimant was going to be investigated about failing to report something else. By the time he resigned on page 141 the claimant believed he was going to face an investigation over the racist comment.

131. The Tribunal's conclusion was that this was a misunderstanding on his part caused by a lack of clarity by the respondent. The respondent was not looking at a failure to report the racist comment but instead at the failure to report the texts from Mr Brown. Even though it was apparent to Ms Mcloughlin in the meeting on 15 March that the claimant thought it was about the racist comment, that misapprehension was not corrected. In our judgment the lack of clarity as to the concerns that would be taken forward, and the failure to correct that misapprehension, could reasonably be seen by the claimant as a detriment. It left the claimant thinking wrongly that the respondent was an employer wanting to re-open something for no good reason. The claimant was subjected to a detriment.

132. That took us to issue number 3, which is whether the ground for that detrimental treatment was because the claimant had made a protected disclosure. The test for us was whether the managers concerned were influenced to any material extent by the fact the claimant had made a protected disclosure about the text messages.

133. We noted two points. Firstly, when the claimant was suspended in November 2015 the reasons for his suspension were not made clear to him for some seven weeks until his meeting in January 2016. That failure to communicate clearly occurred a year before any protected disclosure.

134. Secondly, there were other instances of poor communication by the respondent. For example, the claimant was not told specifically what would be going forward in relation to Mr Brown.

135. We accepted that there was a causal link between the disclosure of the text messages and the lack of clarity about the investigation in the sense that if the claimant had not raised those texts in his grievance, there would have been no investigation and therefore no lack of clarity, but that is not the correct test. The test is whether the managers were influenced, consciously or subconsciously, in their mental processes by the fact a protected disclosure had been made.

136. The Tribunal was satisfied that the respondent would have dealt with the matter in the same way if the November 2014 texts had come to light without there being any protected disclosure (e.g. if another employee had reported them). The lack of clarity and the failure to correct the claimant's misapprehension about the subject matter of the investigation was not on the ground that he had made a protected disclosure. He was not being penalised or punished for making a protected disclosure. The respondent had shown the ground for the treatment; it was a desire not to breach confidentiality by giving the claimant details of disciplinary matters involving a different employee.

137. Accordingly, the complaint of detriment in employment under section 47B failed and was dismissed.

Discussion and Conclusions – Constructive Dismissal

138. The primary question was whether the claimant's resignation should be construed as a dismissal (Issue 4). In his further particulars the claimant identified a total of ten matters which he said amounted to a breach of trust and confidence, either individually or cumulatively.

139. The test to be applied is found in the **Malik** decision of the House of Lords. It is that the conduct of the employer must be without reasonable and proper cause and must, when viewed objectively, be calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and the employee. It is a demanding test. It is not enough to establish that an employer has acted unreasonably. It must be conduct which shows that the employer is effectively abandoning the contract and altogether refusing to perform it.

140. Against that background we turned to the individual allegations within paragraph 4 of the List of Issues. For convenience each will be reproduced before

our conclusions on it explained. We will address the cumulative effect of matters at the end.

1. The failure of Mr Brown to take action when the claimant reported a drunk colleague in June 2015;

141. The Tribunal had to make a factual finding about this. We had the claimant's evidence and no direct evidence from Mr Brown, although we did have the notes of the grievance interviews which Ms Sibson conducted including Mr Brown and Mr Jackson. We saw from pages 339-341 that EP, the colleague in question, was suspended and then resigned in July 2015, but what was disputed was whether that was the first occasion or whether there had been a similar incident in June 2015.

142. We noted that Mr Brown had given inconsistent accounts on this point. When first interviewed at page 249 he said he was aware of the earlier incident involving EP but that the claimant had dealt with it, but in his second interview at page 278 he said he was only told about it after EP had already left. Having heard from the claimant in person, we accepted his account of this matter, supported as it was by the account given by Mr Jackson recorded at page 298.

143. We found that the relevant facts were as Mr Jackson relayed them to Ms Sibson. Mr Brown was made aware in June 2015 that EP had arrived for work under the influence of alcohol. Mr Jackson did a statement about it and spoke to Mr Brown. Mr Brown said that EP was having a lot of problems at home. Mr Jackson protested but Mr Brown decided to take no action. It was only when it happened again in July that EP was suspended and then resigned.

144. We then applied the **Malik** test to those facts. This was a serious matter. A member of staff with safeguarding responsibilities was attending work under the influence of alcohol. The claimant was the team leader. He dealt with the issue by taking EP home. It was up to the Registered Manager to deal with it, yet he took no action. There could have been a further incident, and the claimant could have faced repercussions personally if there were safeguarding issues because of a repetition of that conduct.

145. The concern about EP's problems at home was entirely legitimate and that might ultimately be a reason not to pursue matters by way of a formal disciplinary measure, but it did not excuse the failure of Mr Brown to address the matter at all. There was no evidence that Mr Brown spoke to EP as an informal measure to discuss whether the respondent could offer help and support in relation to alcohol use. The absence of any action at all by Mr Brown, viewed objectively, undermined the claimant in his position as a team leader and failed to address the safeguarding issue for the young people at the home. It was no answer to this point, in our judgment, to say the claimant could have reported it to Ofsted or the LADO. The Registered Manager of the Home was aware of the incident, and the claimant was entitled to expect it would be dealt with properly. Mr Brown's inaction left him exposed. We concluded that this did amount to a breach of trust and confidence in June 2015.

2. Mr Brown's response to the claimant in July 2015 when he questioned Mr Simpson about the rota, and the failure of management to take action when it was reported by the claimant in August 2015;

146. Allegation 2 had two elements to it. The first was the alleged comment by Mr Brown about the claimant being moved if he did not "get on board", and the second was about the alleged failure of management to take action when the claimant reported that comment to Ms Mcloughlin in a telephone call in early September.

147. We had to make a factual finding about what was said, if anything. The Tribunal saw what the claimant wrote in his grievance at page 85 and what he said in his interview at page 97. The comment in question was made by Mr Brown with Mr Burt present. Ms Sibson interviewed Mr Burt and as recorded at page 263 he said he did not recall it, and it was not the sort of thing Mr Brown would say. For his part Mr Brown when interviewed at page 248 denied it. However, we noted that the claimant's witness, Mr Clough, in his unchallenged evidence (paragraph 3 of his witness statement) said that Mr Brown had said to him that any employee complaining and involving the unions would be "down the road". That kind of comment was consistent with the comment alleged by the claimant on this occasion.

148. On the balance of probabilities based on the evidence in this hearing we found that Mr Brown did make the comment to the claimant as the claimant alleged. We did not hear oral evidence from Mr Brown or Mr Burt. The claimant was a credible and honest witness. We concluded the comment was made as the claimant alleged.

149. We considered then whether that comment would breach the **Malik** test and amount to a breach of trust and confidence. In one sense it could be viewed as just a passing remark by a manager conveying in an ill-advised way that he wants a cohesive team where managers do not question each other in front of the rest of the team. However, a number of considerations pointed against that conclusion.

150. Firstly, the claimant was making a polite query about why in two respects the rota treated him less favourably than his colleagues were being treated. Secondly, there was some formality in the meeting: the claimant was called to it by an email. Thirdly, the words used by Mr Brown sent a clear message that there would be adverse consequences if the claimant did not "get on board". That comment was not seeking to dissuade the claimant from raising issues in front of other members of the team, but rather from raising any issues at all. Fourthly, we noted that the claimant's contract did contain a mobility clause and he could be required to work at other homes, but even so to move someone for an improper reason could still be a breach of contract. Finally, we noted that continuity of care was important for the young people in the home and staff should not be moved lightly or for the manager's convenience. By that stage the claimant had been there for about 3½ years.

151. Putting those matters together we concluded that the threat of being moved if the claimant did not "get on board" was something for which there was no reasonable cause. Nevertheless, in isolation a single comment was not enough, viewed objectively, to be likely to seriously damage the claimant's trust and confidence, but it could certainly contribute to a breach of the **Malik** test.

152. The second element of allegation 2 was the alleged failure of management to deal with it properly when it was reported. The claimant did not make a written

report. He told Ms Mcloughlin about it on the telephone in the middle of a number of other things which he conveyed. It was clear to us that she had missed that point. The claimant forwarded the emails on 8 September 2015 but did not highlight this comment in forwarding those emails. Ms Mcloughlin passed the matter to Mr Taylor to deal with. He set up a mediation meeting at the end of September 2015. The claimant had a chance to raise this matter then but did not. In our conclusion there was reasonable cause for dealing with the matter in that way and the management response did not amount to a breach of trust and confidence.

3. The response to the claimant's report of racist language by Mr Simpson in August 2015;

153. There was a dispute on the facts about how this was reported. Ms Naylor said in her interview with Ms Sibson that the comment was made by Mr Simpson and she spoke to the claimant about it, that the claimant then documented it and she signed the record. At page 172B and 172C was a signed supervision record from 5 August 2015 which made no mention of this exchange, but that was shown to Ms Naylor in the interview at the end of 2016 and she said there was a second record which she had signed. We found as a fact that there was a signed record as both the claimant and Ms Naylor maintained, even though it was not a record which Ms Sibson managed to retrieve in her grievance investigation. Having obtained that signed confirmation of what had been said by Mr Simpson, the claimant spoke to Mr Ellis, as confirmed by Mr Ellis in his interview at page 254. The claimant sent an email to all staff at page 173. Mr Ellis passed it to Mr Brown.

154. When Mr Brown was interviewed he said two different things. Firstly, he said that Mr Taylor was looking into it, not him. However, Mr Taylor when interviewed at page 260 said he had passed it on to his manager, Mr Tennant, and did not know who was dealing. Secondly, Mr Brown said that he spoke to Ms Naylor personally and that she did not want to pursue the matter. He produced to Ms Sibson an unsigned supervision note of 12 August which appeared at page 172A in our bundle. That note did support what Mr Brown was saying but it was unsigned. Further, Ms Naylor said that it was not accurate (page 289). She said in particular that it was wrong to make her look critical of the claimant. Her account to Ms Sibson was that Mr Brown told her that Mr Simpson would lose his job if she took the matter any further, and in effect that he was pressurising her not to pursue it.

155. Putting those matters together, and in the absence of any direct evidence to our hearing from Mr Brown, the Tribunal found as a fact that it was Mr Brown dealing with this matter as Registered Manager of the Home and not Mr Taylor. We accepted Ms Naylor's account that it was Mr Brown who did not want her to pursue it. Page 172A was not an accurate record of their discussion. It had not been signed. There was a failure by Mr Brown to pursue this matter properly because he did not want Mr Simpson to lose his job.

156. Applying the **Malik** test we concluded that that failure by Mr Brown was a breach of trust and confidence. We noted that according to Ms Naylor the claimant was disgusted when he heard the comment. He dealt with it appropriately. He obtained a written signed record from Ms Naylor and reported it immediately to Mr Ellis. There is clearly a safeguarding issue if a member of staff uses racist language, even if that is not done within the hearing of the young person in question. This was another situation where the claimant as team leader was not supported by the Registered Manager on an important safeguarding issue, and viewed objectively that

was likely to seriously damage the claimant's trust and confidence. This was a fundamental breach of contract.

4. The failure of management to take action in September 2015 when the claimant reported rude and curt email responses by Mr Brown;

157. The emails in question were forwarded to Ms Mcloughlin on 8 September (page 179). She passed the matter to Mr Taylor. He arranged the mediation meeting. The emails were not mentioned although the claimant would have been free to raise them had he wished.

158. In our judgment there was reasonable cause for Ms Mcloughlin and Mr Taylor to deal with the matter in that way. At its heart this was an issue about communication and the working relationship between the claimant and Mr Brown and mediation was a sensible and appropriate step to take even though with hindsight it was unsuccessful. There was no breach of trust and confidence on allegation 4.

5. The failure of management to take action in September 2015 when the claimant reported that Mr Simpson had called a young person a "little dickhead";

159. Allegation 5 was not directed at Mr Brown but at Mr Burt. The allegation was that when the claimant told Mr Burt that Mr Simpson had called a young person "a little dickhead" Mr Burt said he would speak to Mr Simpson about it but not record those words in the supervision record in order to avoid the matter being reported to the LADO.

160. There was an evidential issue for the claimant. He did not mention it in the grievance, which was about Mr Brown. It appeared he mentioned it for the first time on 20 January 2017 to Mr Barrow as noted at page 121A.

161. There was no evidence from Mr Burt about this because it was not in the grievance and therefore Ms Sibson could not ask him about it. He was not called as a witness by the respondent in this hearing. There was no evidence that the claimant took it any further after speaking to Mr Burt and he did not mention it in his resignation letter.

162. However, when cross examined by Mr Breen the claimant was challenged as to why he had not raised it earlier. It was not put to him that this never happened. On balance we found that it had happened as the claimant recounted at pages 49 and 50 of his further particulars.

163. We considered whether that met the **Malik** test. We concluded that it did. Mr Burt knew that what Mr Simpson had done was serious enough to warrant a referral to LADO but sought to prevent that by incompletely recording his subsequent discussion with Mr Simpson. Effectively, Mr Burt was looking to sweep a safeguarding concern under the carpet. The claimant was a team leader. He could reasonably expect that his own line managers would support him by taking safeguarding issues seriously. Instead this issue was dealt with informally and in a way that prevented proper regulatory scrutiny. There was no reasonable cause for this and viewed objectively it was likely to seriously damage his trust and confidence. That too was a breach of his contract of employment.

2015 Allegations Cumulatively

164. Before addressing the 2016 allegations it is convenient to take stock. The Tribunal found for the reasons set out above that there were three breaches of trust and confidence between June and September 2015. They were:

(1) Mr Brown's lack of action when EP first attended work under the influence of alcohol (Allegation 1);

(2) The failure of Mr Brown to address the racist comment made by Mr Simpson (Allegation 3); and

(3) The failure of Mr Burt accurately to record the "dickhead" comment made by Mr Simpson in order to prevent the matter being reported to LADO (Allegation 5).

165. In addition, the comment made by Mr Brown that if the claimant did not "get on board" he would be moved (Allegation 2) did not itself breach trust and confidence but it contributed to it. Putting these matters together we were satisfied that there had been a fundamental breach of contract by the respondent by September 2015.

166. We moved to the 2016 allegations.

6. The failure of management to suspend Mr Brown after the claimant's grievance in November 2016;

167. The claimant's concern that Mr Brown was not suspended was based in part on his own experience in 2015 when he was suspended on what he considered to be trivial allegations. However, the decision to suspend the claimant in 2015 was a reasonable one. There were written allegations of bullying made by two people who were directly managed by him. If not suspended the claimant would have carried on working with them day to day. To take steps to separate the parties to that dispute was reasonable.

168. In November 2016 when the claimant lodged his own grievance the position was different. Mr Brown and the claimant were no longer working directly together. The claimant had been moved to a different home in January 2016 and had been off sick since February. The main thrust of the grievance, that Mr Brown had embarked on a campaign to force the claimant out of Cumbria View, was historic.

169. It is right to recognise, as the claimant emphasised, that part of his grievance was that Mr Brown had encouraged him to do a false report in November 2014. That was a serious allegation on its face supported by the text message, and it raised an issue of safeguarding, not just an issue about working relationships between different members of staff. It was also an allegation consistent with the May 2015 text, saying "lay it on thick".

170. The respondent dealt with this point by saying that Mr Brown was not directly involved in safeguarding matters; he was not a Registered Manager of a home at that point, having been promoted in May 2016, and not directly managing staff in the same way.

171. We noted too that the texts were between 18 months and two years before the date the grievance was lodged. These were matters which, according to Ms Sibson, Mr Tennant took into account when deciding not to suspend Mr Brown. He made that decision having been briefed by Ms Sibson on what the claimant had said in his interview on 22 November 2016.

172. Suspension is officially a neutral act but it is rarely seen that way. It is not something to be undertaken lightly for any employee, let alone for a senior manager with long service. Mr Brown could quite properly have been suspended on this occasion but we concluded the respondent could reasonably take a different view. The fact that Mr Brown ended up with a final written warning over these matters does not mean that suspension was the only reasonable step to be taken at the outset of the investigation. We concluded there was no breach of trust and confidence in the failure to suspend Mr Brown.

7(a). The failure of management to take steps to prevent the claimant coming into contact with Mr Brown on 22 November 2016;

173. The car park encounter was clearly an unfortunate incident which shocked the claimant. He made his concerns about it plain at the start of his meeting with Ms Sibson a few minutes later.

174. We noted that Ms Sibson arranged the grievance interview at Head Office. Mr Brown was not based there day-to-day. The claimant had not requested a meeting at a different venue or raised concern about the possibility of encountering Mr Brown.

175. With hindsight one can say that Ms Sibson could have taken steps to prevent it, perhaps by arranging an alternative venue for meeting the claimant. However, that is a counsel of perfection and applying the **Malik** test we concluded that there was no failure by the respondent which could, when viewed objectively, amount to a breach of trust and confidence. It was an unfortunate and unlikely coincidence that Mr Brown and the claimant were in the car park at the same moment.

7(b). The failure of management after 22 November 2016 to take action over the use of the term "apply a squeeze" by Mr Brown;

176. The claimant thought that the use of this phrase (which he took to indicate improper physical restraint) had not been addressed because the outcome letter did not clearly explain what matters would be escalated (page 111).

177. However, the Tribunal has to apply an objective test. The **Malik** test does not require the Tribunal to be bound by the perception of the claimant as to what has happened. We were satisfied on the evidence before us that this matter was pursued in the investigation by Ms Sibson. She asked different witnesses their understanding of that phrase. That text was also pursued as a disciplinary matter against Mr Brown resulting, in part, in the final written warning administered to him in early 2017. There was no breach of trust and confidence.

8. The grievance response of 14 December 2016 in which Joanne Sibson concluded that Mr Brown had not treated the claimant unfairly and that the claimant had been warned he would be suspended if there were any more issues raised;

178. Allegation 8 had two elements. The first was the conclusion that the claimant had been warned he would be suspended if there were any more issues raised. That was a conclusion which Ms Sibson drew, at least in part, from the supervision record which appeared in our bundle at page 169. The claimant pointed out with some force some anomalies about that record: it was unsigned, unlike almost all the other supervision records; and it appeared that the opening paragraph had been cut and pasted from another document because a spelling error in the claimant's first name had been replicated.

179. We agreed with the claimant that those discrepancies could call for further investigation. They were not noticed by Ms Sibson, and because she did not go back to interview the claimant after her interviews of other people and put this documentation to him, he did not have the chance to raise that point with her at the time.

180. However, stepping back we noted that this was an investigation conducted by a HR Manager some two years after some of the events in question, and we concluded that there was reasonable cause for Ms Sibson to go by what purported to be the written record from the time. There was no breach of trust and confidence in her reaching that conclusion in her outcome letter.

181. The second element of allegation 8 was more wide-ranging. It was that Ms Sibson's conclusion that Mr Brown had not treated the claimant unfairly could not be justified given the finding that there was an issue to be pursued with him about the text messages from November 2014. That conclusion was made clear by Ms Sibson at page 111 in her outcome letter where she said it was not unfair and unprofessional to the claimant personally but would be escalated.

182. The respondent made two points about this. Firstly, the text at page 90 was ambiguous due to a missing word. Although the claimant's interpretation that he was being told to falsify his report was a reasonable one, an alternative reading could be that he was being told by Mr Brown to write it as it happened. It could be read not as "*write it up as [if] you did*" but as "*write it up as you did [it]*".

183. Secondly, the broad thrust of the grievance, namely that there had been a campaign of unfair and unprofessional behaviour by Mr Brown to get the claimant out of Cumbria View, was not made out on the evidence gathered by Ms Sibson from the interviews. The respondent argued that on a broad view her rejection of the grievance was reasonable.

184. We noted that Ms Sibson conducted a thorough investigation. She conducted twelve interviews, and some people were interviewed more than once. She obtained through her careful questioning about the different issues in the grievance a fairly clear picture of the working relationship, and as one might expect there were allegations on both sides.

185. We concluded overall that this grievance was taken seriously by Ms Sibson and the points made by the claimant were investigated. The view that the

overarching thrust of his grievance, a campaign by Mr Brown to get him out of Cumbria View, was not made out was a reasonable view on the evidence gathered.

186. Further, the text messages in question were not ignored. The claimant was told that they were being escalated, although details were not spelled out to him. So although the Tribunal understood the claimant's concern about this passage in the grievance outcome letter, we concluded that there was reasonable cause for Ms Sibson to take that view and therefore no breach of trust and confidence on allegation 8.

9. The conclusion of Joanne Sibson in the grievance response that action was taken as soon as there was concrete evidence of the colleague being drunk in June 2015;

187. On the evidence we saw in this hearing the conclusion that action was taken as soon as there was concrete evidence was wrong. Mr Jackson did a statement which supported the claimant's allegation. Mr Brown gave Ms Sibson conflicting accounts about this matter. The matter had not been addressed properly in June 2015 when there was concrete evidence.

188. However, it is important to note from page 111 what Ms Sibson actually concluded about this matter. She said:

> **"I have looked into the issue you raised regarding EP and it seems that as soon as we had concrete evidence that there was an issue this was dealt with. However, I agree with you that something more could possibly have been done earlier. However so long after the incident it is very hard to gather more information."**

189. That was not a conclusion expressed in a forthright way that the claimant was simply wrong about this allegation. His concerns were not being dismissed. In a sense, Ms Sibson was agreeing with the claimant that something could have been done earlier. We inferred that the reference to "difficulties in gathering information" was a reference to the fact that she had not been given a copy of Mr Jackson's statement when she made enquiries about it.

190. It would have been reasonable for Ms Sibson to have concluded that Mr Brown did fail to deal with the matter on the first occasion; that of course was our own conclusion (see Allegation 1 above). Nevertheless, on the evidence she had over 15 months after the events in question her conclusion that she could not be sure was a reasonable one as well. There was no paperwork available to her from June 2015; only July 2015. EP had gone. It had been dealt with and it was a historic issue.

191. We concluded that this did not represent a breach of trust and confidence even though the claimant was unhappy with Ms Sibson's conclusion.

10. the conduct of the meeting of 15 March 2017;

192. The core of this allegation was not really the meeting itself but rather the confirmation that the claimant was going to face investigation himself. In fact that was more fully addressed in the letter of 20 March 2017. It was fair to take the allegation as encompassing the letter as well.

193. We noted that the claimant put it very clearly in his resignation letter at page 141. He said:

> **"There appears to be a threat if I return to work that I will subject to disciplinary action relating to an allegation that I had failed to follow safeguarding responsibilities, in particular that I had not passed on a complaint about a racist comment, which is in fact incorrect (see letter 14 December 2016 from Joanne Sibson)."**

194. As we have mentioned in our conclusions on the detriment claim, it was not made clear to the claimant in writing what that investigation would be dealing with. No doubt for that reason the claimant raised this at his meeting with Mr Barrow on 20 January, and he left that meeting with the firm view that he was going to be investigated over failing to report the racist comment by Mr Simpson. It seems likely on the evidence we heard that the racist comment was mentioned by Mr Barrow, but in the context of the action to be taken forward in relation to Mr Simpson. We concluded there had been a misunderstanding at that meeting.

195. In the absence meeting on 13 March (as recorded at page 133) the claimant said that it was the racist comment which would be looked at, but in her letter of 20 March (page 139), Ms Mcloughlin confirmed there would be an investigation but did not clarify that it was about the text messages not about the racist comment. She did not correct the claimant's misapprehension.

196. The claimant's belief that the investigation was unwarranted was entirely understandable. Had it been an investigation into whether he had failed to deal with the racist comment properly, we would have agreed with him. That had plainly been actioned by him at the time the comment was reported to him in 2015.

197. However, the reality, unbeknownst to the claimant, was that the investigation was about his failure to report the safeguarding concerns regarding Mr Brown's texts.

198. The Tribunal was required by the legal framework to look at matters objectively, not to go by the claimant's perception. We had to ask ourselves whether the decision to investigate the delay in bringing those matters to light breached the **Malik** test.

199. We concluded that the matter could have been communicated more clearly to the claimant and in language that did not give him the impression he was being threatened with some sort of punishment or adverse action. However, the **Malik** test is a high threshold and a communication failing alone is rarely sufficient to breach trust and confidence where the substantive concern could legitimately be looked at. We concluded that the respondent had reasonable cause for saying that it wanted to investigate why the November 2014 text was not reported any earlier by the claimant. On the claimant's own case it was an instruction to him from a manager that he could lie in an incident report if necessary to conceal what had happened. As the claimant rightly said two years later, that was a very serious matter and the respondent was entitled to want to enquire into why that had not been brought to light at a much earlier stage.

200. Accordingly we concluded that the decision to investigate the failure to report the text messages was a decision with reasonable cause. The failure to communicate it clearly was not a breach of trust and confidence.

Cumulative Effect of 2016 Allegations

201. The Tribunal stepped back and looked at allegations 6-10 cumulatively to see whether taken together they amounted to a breach of trust and confidence.

202. We noted that management were faced with a difficult grievance to resolve. It raised a wide range of matters going back at least 12 months. It was taken seriously and a thorough investigation conducted. Ms Sibson did her best to investigate it. The conclusions were reasonable ones. There were some matters taken forward. Although the claimant was aggrieved at the outcome and the failure to dismiss Mr Brown, that subjective view was not determinative. There was a lack of clarity about the investigation the claimant would face, but overall the Tribunal was satisfied that taken cumulatively there was no breach of the **Malik** term as to trust and confidence in allegations 6-10.

Last Straw

203. We considered whether any of the 2016 matters could amount to a last straw which, when taken with the 2015 matters, cumulatively breached trust and confidence. In principle a later action, unless entirely innocuous, can effectively "revive" the right to terminate the contract due to an earlier fundamental breach by the employer even if the claimant has continued in employment since that breach and affirmed the contract by doing so. Underhill LJ considered this in paragraphs 43-45 of **Kaur**. However, on the facts of this case we rejected this argument. Although the failure to make clear that the investigation would be about the texts, not the racist comment, could reasonably be viewed as detrimental, it was unrelated to the earlier breach of trust and confidence by the individual managers Mr Brown and Mr Burt. The claimant expressed this when he said that he retained trust in the organisation in 2015, even though he had lost it in relation to Mr Brown personally. In that sense this was not part of a "series of acts" as Dyson LJ described in in paragraph 20 of **Omilaju**. It was a different type of act by different managers over 12 months later.

204. Overall, therefore, the Tribunal concluded that there was a breach of contract in the actions of Mr Brown and one action by Mr Burt between June and September 2015, but there was no breach of trust and confidence after that date.

Reason for Resignation

205. We then turned to issue 4(b): was that breach of trust and confidence in 2015 a reason for the claimant's resignation? The case law establishes that there is no requirement that the breach be the predominant reason or a significant reason as long as it is one of the reasons which causes the claimant to resign.

206. We considered that the best insight into why the claimant resigned was not the further particulars which his solicitors provided but rather the resignation letter that he wrote at the time (31 March 2017 pages 141-142). It was a carefully written letter. It was clear and detailed. On its face it did not mention the matters between June and September 2015. They appeared to feature only because it was those matters about which he complained in November 2016. The overwhelming point made by the claimant in this letter was about the company's reaction to his grievance in 2016. He emphasised the lack of adequate action against Mr Brown (the claimant was very candid in saying he wanted Mr Brown sacked), and, crucially, the perceived

threat of disciplinary action against him over an alleged failure to report the racist comments when they were made. His concern was that on his return to work he would not be protected by management and therefore there would be a further risk of injury to his health and welfare. That was an understandable concern given his health issues since February 2016.

207. Importantly, however, as well as the resignation letter we noted what the claimant said in cross examination. He said that in 2015 he had lost trust in Mr Brown, not in the company. He said he only lost trust in the company when the grievance was not investigated and when he spoke to Mr Barrow, which of course is the moment at which he formed the view (in error) that he would be investigated for failing to deal properly with the racist comment. That evidence rang true: it was consistent with the fact that the claimant did not resign in September 2015: he carried on at work for a further two months or so prior to his suspension in mid-November 2015. Applying **Chindove**, we concluded that by doing so he affirmed the contract despite the breach.

208. Putting those matters together we concluded that although there had been a breach of trust and confidence in the way Mr Brown treated the claimant in 2015, that was not a reason for the claimant's resignation. That treatment caused him to lose confidence in Mr Brown as a manager, not in the organisation as a whole. He carried on working before going off sick. He only lost confidence in the organisation in March 2017 because of what he saw as a failure to deal properly with his grievance, a failure to take adequate action against Mr Brown and because of the threat that he would be investigated over not reporting the racist comment even though managers knew he had reported it.

209. A breach of trust and confidence gives rise to a constructive dismissal only if the claimant resigns (at least in part) because of it. In this case we were satisfied he resigned for other reasons (the handling of his grievance in 2016-2017) which did not amount to a breach of trust and confidence, even when seen in the light of those earlier matters. It followed that his resignation was not a dismissal, and therefore the unfair dismissal claim failed and was dismissed. Issues 5 and 6 fell away.

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Employment Judge Franey

10 July 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

25 July 2018

FOR THE TRIBUNAL OFFICE